

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2005-549

May 23, 2006

PUBLIC UTILITIES COMMISSION
Underground Facility Damage Prevention
Requirements (Chapter 895) Pursuant to
P.L. 2005, Chapter 334

ORDER ADOPTING
FINAL RULE

ADAMS, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we adopt final amendments to Chapter 895, the Underground Facility Damage Prevention Requirements Rule, in a major substantive rulemaking pursuant to 5 M.R.S.A. § 8071. Specifically, we incorporate legislative changes made to our Provisionally Adopted Rule.¹ We make no further changes to the amendments provisionally adopted in Docket No. 2005-549 or to the new provisions adopted by the Legislature. We discuss the legislative changes briefly in this Order. We also adopt two minor technical amendments that clarify the existing rule.

II. BACKGROUND

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. These procedures, along with those governing the Commission's enforcement activities, are contained in Chapter 895 of our Rules, entitled "Underground Facilities Damage Prevention Requirements."

During the first session of the 122nd Legislature, Maine's Legislature enacted P.L. 2005, ch. 334 (the 2005 Act), which directed us to initiate a rulemaking on four issues:

- alternative notice requirement procedures for excavation;
- newly installed underground facilities in active excavation areas;
- penalties; and
- discovered facilities.

¹ Resolve, Regarding Legislative Review of Portions of Chapter 895: Underground Facility Damage Prevention Requirements, a Major Substantive Rule of the Public Utilities Commission, Resolves 2005, ch. 184 (effective April 12, 2006.)

We issued a Notice of Rulemaking in Docket No. 2005-549 on November 15, 2005 and held a public hearing on December 14, 2005. The following persons commented on the proposed rule at the public hearing: Bangor Hydro-Electric Company (BHE), the Dig Safe System, Inc. (DSS), Central Maine Power Company (CMP), On Target Locating Service (OT), Northern Utilities, Inc. - Maine Division, Telephone Association of Maine (TAM), Downeast Energy, Andrew Bowie Inc. Well Drilling, Weeks & Son Drilling, C&R Well Drilling, H2O Well Drilling, and Verizon Maine (Verizon). We received written comments from AT&T, CMP, DSS, TAM, OT, the Portland Water District, the Winthrop Utilities District, and Verizon.

On February 22, 2006, we issued our Order Provisionally Adopting Rule incorporating the rulemaking amendments to Chapter 895 on the four subject areas noted above. During the second session of the 122nd Legislature, Maine's Legislature approved the Provisionally Adopted Rule subject to certain changes being made. The law was enacted as emergency legislation and therefore took effect when signed by the Governor on April 12, 2006. Resolves 2005, ch. 184.

III. DISCUSSION OF FINAL AMENDMENTS

During the review of our Provisionally Adopted Rule by the Utilities and Energy Committee, TAM objected to aspects of our enforcement process and requested that the Committee require additional changes to Chapter 895. We agreed to make changes to the Rule to better reflect our current investigatory practice. We drafted amending language, to which TAM consented, which formed the basis for the provisions in the Legislative Resolve.

The Legislative Resolve directs us to add a new provision in section 7(B)(1) that: (a) requires the Commission staff to conduct a preliminary investigation regarding any potential violation of the Dig Safe Law or rules; (b) specifies that the preliminary investigation must include a good faith effort to contact the potential violator and afford that person an opportunity to discuss the matter prior to the issuance of a notice of probable violation; and (c) states that nothing in the new provision precludes the issuance of a notice of probable violation if a person cannot be located with reasonable effort or fails to respond to a communication from staff. The Resolve also requires us to: 1) clarify in section 7(B)(2)(a) that the informal review consists of an informal conference or an analysis of the respondent's written reply; 2) specify in section 7(B)(3)(a) that following the informal conference or the waiver of the informal conference, the Commission staff member shall issue in writing a recommended decision indicating whether or not the respondent has violated the Dig Safe Law or the rule and the basis for that conclusion, and the recommended disposition; and 3) make technical changes to the rule that are necessary to accomplish the changes described in the Resolve.

In accordance with Section 1(1) of the Resolve, we have added a new section 7(B)(1)(a) to the Rule, entitled "Preliminary Incident Investigation." This section states that our staff shall engage in a preliminary investigation regarding any potential violation

of the Dig Safe Law or rules and shall make a good faith effort to contact the potential violator and afford that person an opportunity to discuss the matter prior to the issuance of a Notice of Probable Violation (NOPV). It further states that we are not precluded from issuing a NOPV if a person cannot be located with reasonable effort or fails to respond to a communication from the staff.

In accordance with Section 1(2) of the Resolve, we have added the word "or" to section 7(B)(2)(a) to clarify that the informal review shall consist of an informal conference or an analysis of the respondent's written reply, if any, or both.

In accordance with Section 1(3) of the Resolve, we have added the phrase "or the waiver of the informal conference" to clarify that the staff member shall issue a recommended decision following the informal conference or the respondent's waiver of the conference.

In accordance with Section 1(4) of the Resolve, we make two editorial changes. First, we renumber subsections a through f of Section 7(B)(1) to incorporate the new subsection 7(B)(1)(a). Second, in subsection 7(B)(1)(b), we use the abbreviation for Notice of Probable Violation that is introduced in subsection 7(B)(1)(a).

The Resolve states that we are not required to hold hearings or undertake further proceedings prior to final adoption of the rule.

IV. CONCLUSION

We find that the changes noted above satisfy the legislative directives and approve this final amendment of Chapter 895. Accordingly, we

O R D E R

1. That the attached Chapter 895, Underground Facilities Damage Prevention Requirements, is hereby adopted in its final form;
2. That the Administrative Director shall file this adopted final rule and related materials with the Secretary of State; and
3. That the Administrative Director shall send notice of this Order Adopting Final Rule and Rule to:
4.
 - a. All Maine underground facility owners and operators, including interstate pipelines, sewer, and cable TV operators, to the greatest extent practicable; and
 - b. All excavators operating in Maine, to the greatest extent practicable.

Dated at Augusta, Maine, this 23rd day of May, 2006.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Acting Administrative Director

COMMISSIONERS VOTING FOR: Adams
 Diamond
 Reishus